

available appeal extension time. “Unusual circumstances” means, but only to the extent reasonably necessary to the processing of a particular request:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and examine a voluminous amount of separate and distinct records which are the subject of a single request, or

(iii) The need for consultation, which shall be conducted with all practical speed, with another agency or unit having a substantial interest in the determination of the request, or among two or more components of the responsible unit having substantial subject-matter interest in the pertinent documents.

(3) If no determination has been sent to the requester at the end of the initial ten day period, or the last extension date, the requester may consider the request to be initially denied, and exercise a right of appeal of the denial. When no determination can be made within the applicable time period, the responsible unit shall nevertheless exercise due diligence in continuing to process the request. It shall, on expiration of the applicable time period, inform the requester of the reason for the delay, of the date a determination is expected to be sent, and of the requester's right to treat the delay as a denial and to appeal. It may ask the requester to forego an appeal until a determination is made.

(4) If it is determined that the records requested are to be made available, and there are no further fees to be paid, the responsible official shall promptly notify the requester as to how the disclosable records will be made available. If there are fees still to be paid by the requester, the requester shall be notified that upon payment the records will immediately be made available.

(5) Appendix C lists the limited number of officials who have been authorized to make initial denials of requests for records, except as may be subsequently authorized. A reply initially denying, in whole or in part, a request for records shall be in writing, signed

by an authorized official, and it shall include:

(i) A reference to the specific exemptions of the Act authorizing the withholding of the records, stating briefly why the exemption applies and, where relevant why a discretionary release is not appropriate.

(ii) The name and title or position of each official responsible for the denial.

(iii) A statement of the manner in which any reasonably segregable portion of a record shall be provided to the requester after deletion of the portion which is determined to be exempt.

(iv) A brief statement of the right of the requester to appeal the determination to the General Counsel and the address to which the appeal should be sent, in accordance with §4.8 (a) and (b).

(6) A copy of each initial denial and its incoming request for records shall be provided to the Assistant General Counsel for Administration.

[53 FR 6972, Mar. 4, 1988; 53 FR 16057, 16211, May 5, 1988]

#### **§4.7 Predisclosure notification procedures for confidential commercial information.**

(a) *General policy.* Confidential commercial or financial information provided to the Department of Commerce by a submitter shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section.

(b) *Definitions.* (1) The term “confidential commercial or financial information” means records provided to the Department by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm to the submitter.

(2) The term “submitter” means any person or entity who provides confidential commercial or financial information to the Department. The term “submitter” includes, but is not limited to corporations, state governments and foreign governments.

(c) *Notice to submitters.* A unit of the Department of Commerce shall provide

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a submitter with prompt written notice of a request for disclosure of confidential commercial or financial information whenever required under paragraph (d) of this section. Such written notice shall be sent via certified mail, return receipt requested, or any other expeditious manner which provides for documentation of receipt of such notice. The notice shall either describe the exact nature of the information requested or provide copies of the records or portions thereof containing the confidential information.

(d) *When notice is required.* (1) For confidential commercial or financial information submitted to the Department prior to January 1, 1988, the unit shall provide a submitter with notice of a request whenever:

(i) The records are less than ten years old, and the information has been designated by the submitter as confidential commercial or financial information;

(ii) The Department has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(iii) The information is the subject of a prior express commitment of confidentiality given by the Department to the submitter.

(2) For confidential commercial or financial information submitted to the Department on or after January 1, 1988, the unit shall provide a submitter with notice of a request whenever:

(i) The submitter has in good faith designated the information as confidential commercial or financial information, or

(ii) The unit has reason to believe that disclosure of the information could reasonably be expected to result in substantial competitive harm to the submitter.

(3) When a submitter has designated commercial or financial information as confidential, notice of a FOIA request for such information shall be required for a period of not more than ten years after the date of submission unless the submitter requests, and provides acceptable justification for, a specific notice period of greater duration. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an offi-

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cer or authorized representative of the submitter that the information at issue is in fact confidential commercial or financial information which has not been disclosed to the public.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, a unit shall afford a submitter 7 working days from date of receipt of such notice within which to provide the unit with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information and shall demonstrate why the information is considered to be commercial or financial information whose disclosure is likely to cause substantial competitive harm to the submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA. Whenever notice is given to a submitter under this section the requester shall be advised that the submitter has been provided with notice and an opportunity to object to disclosure.

(f) *Notice of intent to disclose.* A unit shall carefully consider a submitter's objections and specific grounds for non-disclosure prior to determining whether to disclose confidential commercial or financial information. Whenever a unit decides to disclose information over the objection of a submitter, the unit shall forward a written notice to the submitter which includes:

(1) A statement of the reasons why the submitter's objections to disclosure were not sustained;

(2) A description of the information to be disclosed; and

(3) A specified disclosure date. Notice of intent to disclose shall be forwarded to the submitter via certified mail, return receipt requested. Such notice shall state the unit's intent to disclose the information on the expiration of 7 working days from the date of the submitter's receipt of the notice. When notice of intent to disclose is provided to the submitter, the requester shall be advised of such notice and of the specified disclosure date.

(g) *Notice of FOIA lawsuit.* Whenever a requester brings a legal action seeking to compel disclosure of information subject to the notice requirements of

paragraph (d) of this section, the unit shall promptly notify the submitter.

(h) *When notice is not required.* The notice requirements of this section shall not apply if:

(1) The Department determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(4) The disclosure is required by an agency rule which: (i) was adopted pursuant to notice and public comment; (ii) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; and (iii) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(5) The designation made by the submitter of confidential commercial or financial information appears obviously frivolous, except that the Department must provide the submitter with written notice of any final administrative disclosure determination 7 working days prior to the specified disclosure date.

[53 FR 6972, Mar. 4, 1988; 53 FR 16057, May 5, 1988]

#### **§ 4.8 Appeals from initial determinations or untimely delays.**

(a) When a request for records has been initially denied in whole or in part, or has not been timely determined, or when a requester has received an adverse initial determination regarding any other matter under this regulation, the requester may submit a written appeal within thirty calendar days after the date of the written denial or, if there has been no determination, on the last day of the applicable time limit. The appeal shall include a copy of the original request, the initial denial, if any, and a statement of the reasons why the records requested should be made available and why the initial denial, if any, was in error. No

opportunity for personal appearance, oral argument or hearing on appeal is provided.

(b) An appeal shall be addressed to the Assistant General Counsel for Administration, Department of Commerce, Room 5882, 14th and Constitution Avenue NW., Washington, DC 20230. Both the appeal envelope and the letter shall be clearly marked "Freedom of Information Appeal." An appeal not addressed and marked as provided herein will be so marked by Department personnel when it is so identified, and will be forwarded immediately to the Assistant General Counsel for Administration. An appeal incorrectly addressed will not be deemed to have been "received" for purposes of the time period for appeal set forth in 5 U.S.C. 552(a)(6), until the earlier of the time that forwarding to the Assistant General Counsel for Administration has been effected; or such forwarding would have been effected with the exercise of due diligence by Department personnel. In each instance when an appeal is so forwarded, the Office of the Assistant General Counsel for Administration shall notify the requester that the appeal was improperly addressed and of the date the appeal was received by the office. All appeals shall be decided by the Assistant General Counsel for Administration with the exception of appeals for records which were initially denied by the Assistant General Counsel for Administration. Appeals initially denied by the Assistant General Counsel for Administration shall be decided by the General Counsel at the address listed in this paragraph.

(c) The Assistant General Counsel for Administration shall make a determination on an appeal within twenty days (excluding Saturdays, Sundays and legal public holidays) of its receipt, unless an extension of time is taken in unusual circumstances, when the time for action may be extended up to ten days (excluding Saturdays, Sundays and legal public holidays) minus any days of extension granted at the initial request level. A notice of such extension shall be sent to the requester, setting forth the reasons and the date on which a determination of the appeal is expected to be sent. As